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In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1240.

LOUIS LORENZA,
Petitioner,

vs.

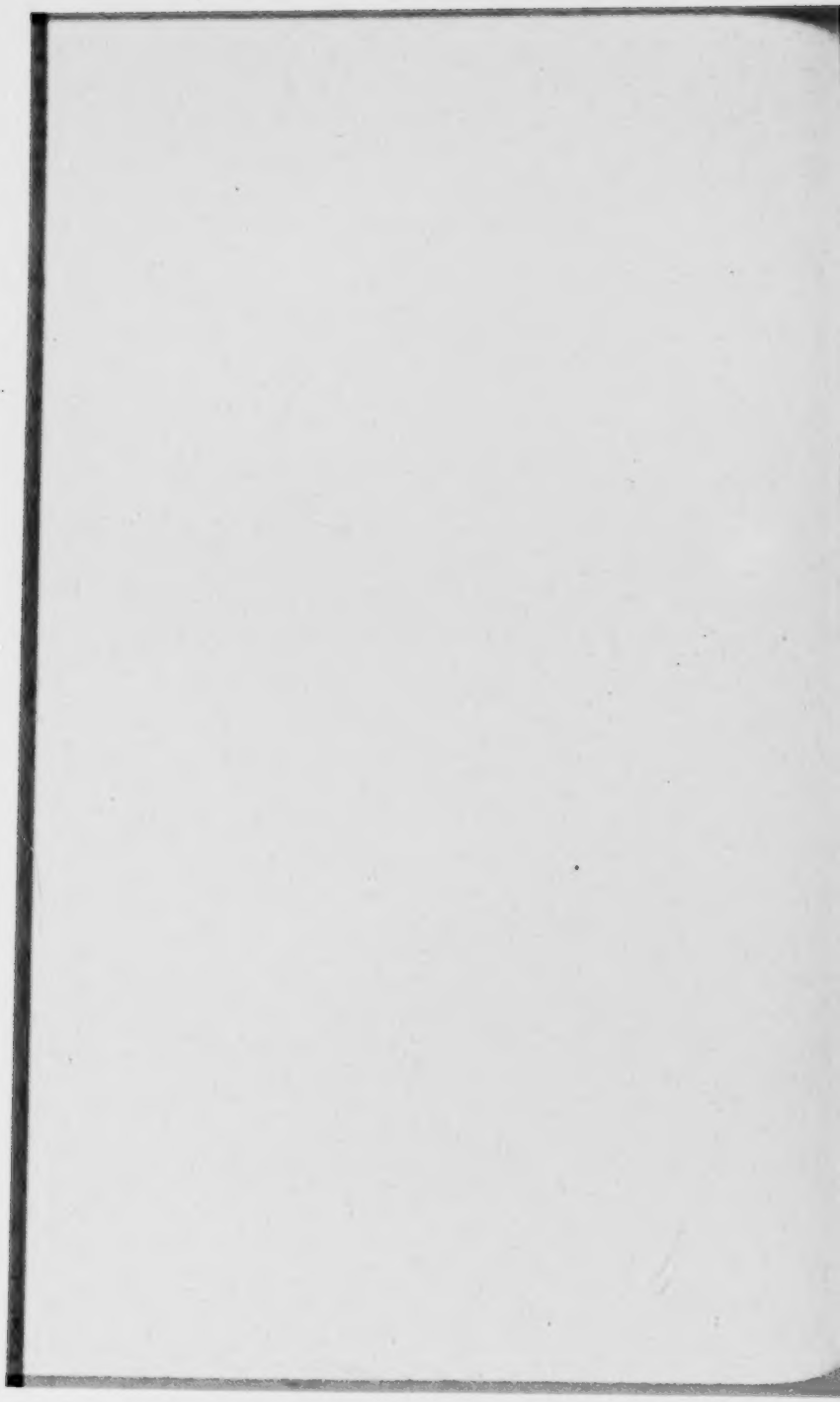
THE CITY OF CLEVELAND,
Respondent.

BRIEF OF THE RESPONDENT CITY OF CLEVELAND OPPOSING PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Statement of the Case 1

Questions Presented 2

The Court Lacks Jurisdiction as the Constitutional Question Was Not Necessarily Decided by the State Court and the Federal Question as Presented Was Not Properly Preserved 3

Conclusion 12

TABLE OF AUTHORITIES.

Cases.

Adams vs. New York, 192 U. S. 585 ..... 9, 12

Boyd vs. U. S., 116 U. S. 616 8

Burdeau vs. McDowell, 256 U. S. 465 8

City of Cleveland vs. Weisberg, 141 O. S. 625 12

City of Xenia vs. Smith, 139 O. S. 169 12

Connecticut Railway & Lighting Co. vs. Palmer et al., Trustees, 305 U. S. 493 3

Feldman vs. United States, 322 U. S. 487 ..... 8, 9

General Talking Pictures Corp. vs. Western Electric Co., 304 U. S. 175 3

Honeyman vs. Hanan, Executor, 300 U. S. 14 11

Maxwell vs. Dow, 176 U. S. 581 10

State vs. Lindway, 131 O. S. 166 ..... 2, 6, 12

Thorington vs. Montgomery, 147 U. S. 490 10

Weeks vs. United States, 232 U. S. 383 8

Constitutional and Statutory Provisions.

Constitution of Ohio:

Article I, Section 10..... 5

Article I, Section 14..... 6, 7

Article I, Section 16..... 5

Federal Constitution:

Fourth and Fifth Amendments.....6, 7, 9, 10, 11, 13

Fourteenth Amendment 7, 9, 11, 13

Municipal Code of Cleveland, Section 2978-1..... 1

28 U. S. C. A., Section 344..... 3

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BRIEF OF THE RESPONDENT CITY OF CLEVELAND OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petitioner was arrested and charged with unlawful possession, custody or control of certain slips representing memorandum of, or evidence of settling, paying, registering, or recording an interest in a certain scheme of chance, to-wit: clearing house, in violation of Section 2978-1 of the Municipal Code of Cleveland, which ordinance makes it a misdemeanor for a person to have in his possession, or in his custody, or under his control, such slips, tickets, documents, etc.

At the trial of the case such slips were presented in evidence and said slips were obtained by policemen of the City of Cleveland when they entered premises in a multiple apartment house without a search warrant. Large quantities of said slips were found on the premises and it appears at points in the record that the defendant's attorney by cross-examination sought to show that the premises were not the residence of the petitioner but of some other person.

Before trial the petitioner filed a motion to suppress the evidence on the grounds that it was obtained in course of an unlawful search and seizure and without warrant. Petitioner complains that he sought to offer evidence on the question of the unlawful search and seizure and was denied this right. We question this claim as we do not believe that the record shows that the petitioner attempted to present any evidence on his motion. The court was fully aware of the facts relating to the seizure, however, and undoubtedly assumed that any statement that counsel for petitioner made as to seizure without warrant was true when he made his ruling based on the decision of the Supreme Court of Ohio which approves of the admission of evidence so obtained. (*State vs. Lindway*, 131 O. S. 166.)

After petitioner's motion was overruled the court proceeded with the trial and the petitioner, the defendant therein, rested without offering any evidence. He was thereupon found guilty. The Court of Appeals affirmed the judgment and the Supreme Court of Ohio refused a motion to certify and dismissed an appeal as of right on the grounds that there was no debatable constitutional question. That entry indicated that so far as the courts of Ohio were concerned the questions involved had been decided.

QUESTIONS PRESENTED.

The petition for writ of certiorari makes reference to a great many points but at page 11 of the printed petition the questions presented to this Court are summarized and may be briefly stated as follows:

1. The right of citizens to the protection of the federal constitutional provision against unreasonable searches and seizures.

2. Was the petitioner denied due process of law as guaranteed by the 14th amendment to the United States Constitution?

Since the petitioner has specifically stated his propositions in this manner, we assume that they are the only propositions that this Court will consider and we therefore will confine our brief to these propositions.

> "1. Review by certiorari is limited to the grounds upon which the writ was sought and allowed. A ruling to which there was but a mere reference in the petition, without request for review, not considered." (*Connecticut Railway & Lighting Co. v. Palmer et al., Trustees*, 305 U. S. 493.)
>
> "1. Review by certiorari is confined to questions specifically brought forward by the petition for the writ. (p. 177.)
>
> The supporting brief is not a part of the petition for this purpose; specifications of error in that brief do not expand or add to the questions stated in the petition; they serve merely to identify and challenge rulings upon which is grounded ultimate decision of the matter involved." (p. 178.) (*General Talking Pictures Corp. vs. Western Electric Co.*, 304 U. S. 175.)

We further assume that the petition for a writ is brought under paragraph (b) of Section 237 of the judicial code, 28 U. S. C. A. Section 344 and specifically under that part of paragraph b which provides that it shall be competent for the Supreme Court by a writ of certiorari to require the highest court of the state to certify its record where there is drawn in question any right, privilege or immunity specifically set up or claimed by either party under the constitution.

THE COURT LACKS JURISDICTION AS THE CONSTITUTIONAL QUESTION WAS NOT NECESSARILY DECIDED BY THE STATE COURT AND THE FEDERAL QUESTION AS PRESENTED WAS NOT PROPERLY PRESERVED.

This case was tried before the Municipal Court of Cleveland. An appeal from said court lies directly to the state Court of Appeals and the state Court of Appeals under our Ohio law is generally speaking a court of last

resort. Under the constitution and laws of the State of Ohio the Supreme Court of the State of Ohio reviews only such cases as involve constitutional questions or involve matters of great public and general interest. In the case at bar the Supreme Court of Ohio never passed upon the merits of this case. Therefore, the decision of the Court of Appeals is in reality the decision of the highest court of the state. After judgment was entered in the Court of Appeals, the petitioner made application to the Supreme Court by way of filing a motion to certify in that court and also filed an appeal as of right. The motion to certify was overruled and the appeal as of right was dismissed on the grounds that the case did not involve any debatable constitutional question.

It therefore becomes important to examine the record and ascertain exactly what questions were presented to the Court of Appeals.

The Assignment of Errors filed with the Court of Appeals is as follows:

1. Court erred in overruling defendant's motion to suppress the evidence.

2. Court erred in overruling the motion to suppress the evidence without hearing any testimony in support of said motion.

3. The defendant has been convicted without due process of law, in violation of his constitutional rights and immunities.

4. The ordinance under which the defendant was charged and convicted is unconstitutional in that, it presumes guilt, in violation of defendant's constitutional rights.

5. Other irregularities appearing on the face of the record in the proceedings, and at the trial, which appellant could not guard against and which vitiated said proceedings, ousted the Court of its jurisdiction, and prevented this appellant from having a regular and fair and impartial trial according to the due course of the law.

Now in order to determine what constitutional rights the petitioner claims were violated let us examine his brief in the Court of Appeals and see what propositions were urged upon the court. Their brief is subdivided as Argument I, II and III.

No argument was advanced in support of Assignment of Error No. 4 as to the ordinance being unconstitutional. Summarizing "Argument No. 1," it is a complaint that the trial court refused to hear evidence on a motion to suppress the evidence and it is contended that by the court's refusal in this respect the defendant was denied his constitutional right and has been convicted without due process of law in violation of Article I, Section 10 and Section 16.

This is definitely a reference to the Constitution of Ohio and not to the federal constitution.

In "Argument 2" the appellant complained that there was a lack of evidence as to what was a clearing house slip.

In "Argument 3" it is contended that there was an entire failure of proof and that the verdict could not be sustained in law or fact and was manifestly against the weight of evidence.

The only definite complaint on constitutional grounds was therefore to the effect that refusal to hear evidence on a motion to suppress evidence violated Article I, Sections 10 and 16 of the Ohio Constitution.

The decision of the Court of Appeals was, as we stated before, of the highest court of Ohio on the merits of the case. When the petitioner sought a review and an appeal of the case in the Supreme Court of Ohio he filed a notice of appeal as of right on questions of law only on the grounds that the case involved questions arising under the constitution of Ohio and the United States. This is the first point at which we find a mention of the constitution of the United States. At the same time he also filed a motion to certify with the Supreme Court of Ohio and with said

motion to certify the appellant filed his assignments of error and they are listed as follows:

> "Now comes the defendant-appellant and respectfully files the following assignments of error in this Court:
>
> (1) Court erred in overruling the motion to suppress the evidence.
>
> (2) Court erred in overruling the motion to suppress the evidence without hearing any testimony in support of said motion.
>
> (3) The defendant has been convicted without due process of law, in violation of his constitutional rights and immunities.
>
> (4) The ordinance under which the defendant was charged and convicted is unconstitutional in that, it presumes guilt, in violation of defendant's constitutional rights.
>
> (5) Other irregularities appearing on the face of the record in the proceedings, and at the trial, which appellant could not guard against and which vitiated said proceedings, ousted the Court of its jurisdiction and prevented this appellant from having a regular and fair and impartial trial according to the due course of the law."

In petitioner's brief in the Supreme Court of Ohio we find only two definite references to the constitution of the United States, first is on page 11. It is stated:

> "We believe sincerely that the construction and interpretation of the 4th and 5th Amendments of the Federal Constitution and Section 14, Article I of the Constitution of the State of Ohio as expressed by Judge Jones in his *Lindway* opinion, entitle this defendant to his Motion to Certify."

The above quotation impresses us with the idea that petitioner is vainly attempting to secure a review of the *Lindway* case (*State vs. Lindway*, 131 O. S. 166—decided by S. C. of Ohio May 27, 1936) rather than the case at bar.

The second reference to the constitution of the United States is found in that part of the Ohio brief captioned "Error Complained Of" beginning on page 7 of that brief. This paragraph on errors complained of may be summarized as follows:

First, "has the defendant's security in his person, house, papers and possessions been violated by the unreasonable search and seizure as guaranteed by the Fourth and Fifth Amendments to the Federation Constitution and Section 14, Article I of the Constitution of the State of Ohio?" Second, "Was the defendant's constitutional right violated by the denial by the trial court of an oral hearing on his Motion to Suppress the Evidence as indicated in the record?" Third, the substance of the third error being the question as to whether a supplemental and later adopted section of the gambling ordinances of the City of Cleveland made it necessary to prove that the confiscated clearing house slips were not a lottery for a charitable or benevolent purpose. It is to be noted that up to this point there has been no mention of the Fourteenth Amendment to the Constitution of the United States which is the second question that is being presented to the Supreme Court of the United States.

If we assume that a violation of the Fourth and Fifth Amendments to the Constitution of the United States was properly presented to any of the Court of Ohio, there is still no federal question involved. There was no federal offense charged. There was no search or seizure or arrest by any federal officer. There was no trial in a federal court. The search and seizure was by local policemen, officers of the City of Cleveland. This Court has repeatedly held that the Fourth and Fifth Amendments to the Constitution of the United States are not directed against local or state officers, but against federal officers. They are provisions to protect the people of the various states against instrusions by federal officers and officials and prevent

federal courts from compelling a man to be a witness against himself or depriving him of life or liberty without due process of law.

The *Weeks* case is one of the early cases in this respect and in that case it was held:

> "The fourth Amendment is not directed to individual misconduct of state officers. Its limitations reach the federal government and its agencies."
>
> *Boyd vs. U. S.*, 116 U. S. 616 (*Weeks vs. United States*, 232 U. S. 383).

This Court has also made some fine distinctions and permitted the use of evidence obtained by unreasonable search in trials in the federal court where the unreasonable search or seizure was not actually made by the federal officers.

In the case of *Burdeau vs. McDowell*, it was held that constitutional guaranties against unreasonable searches and seizures and self-incrimination will not be violated if the Federal prosecuting authorities had no part in the wrongful taking. (See syllabus 1.) Second syllabus is as follows:

> "2. The security afforded by the U. S. Const. 4th Amend., against unreasonable search and seizure, applies solely to governmental action. It is not invaded by the unlawful acts of individuals in which the government has no part." (256 U. S. 465.)

This distinction seems to be followed to the present moment by this Court as we find a similar holding in the case of *Feldman vs. United States*, decided May 29, 1944 and reported in 322 U. S. 487 which holds as follows:

> "The Fifth Amendment does not forbid the use in evidence against a defendant in a criminal case in a federal court of self-incriminating testimony theretofore compelled—under a state immunity statute and without participation by federal officers—in proceedings in a state court."

The *Feldman* case reviews the history of this type of case and apparently it cites with approval the cases we have heretofore mentioned in our brief.

In the case of *Adams vs. New York*, 192 U. S. 585, we have a case involving policy slips and very similar to the case at bar. In that case the law of New York made the mere possession of any paper or document representing a recording of or an interest in the game of numbers or chance a misdemeanor. Likewise, the evidence was obtained by raid of the defendant's premises against his protest without his consent and he claimed that his constitutional right to be secure in his person and papers was violated and that he was compelled to be a witness against himself in contravention of the Fourth and Fifth and Fourteenth Articles of Amendments to the Constitution of the United States. (See page 587.) In the *Adams* case this Court held as follows:

> "The fact that papers, which are pertinent to the issue, may have been illegally taken from the possession of the party against whom they are offered is not a valid objection to their admissibility. The court considers the competency of the evidence and not the method by which it was obtained.
>
> "There is no violation of the constitutional guaranty of privilege from unlawful searches and seizures in admitting as evidence in a criminal trial, papers found in the execution of a valid search warrant prior to the indictment; and by the introduction of such evidence defendant is not compelled to incriminate himself.
>
> "It is within the established power of a State to prescribe the evidence which is to be received in its own courts. The provisions of Sections 344a, and 344b, of the Penal Code of New York making the possession of policy slips by a person other than a public officer presumption of possession knowingly in violation of law are not violative of the Fourteenth Amendment, are not unconstitutional as depriving a citizen of his liberty or property without due process of law, and

do not, on account of the exception as to public officers, deprive him of the equal protection of the laws.

"A suggested construction of a state statute which would lead to a manifest absurdity and which has not, and is not likely to receive judicial sanction, will not be accepted by this Court as the basis of declaring the statute unconstitutional when the courts of the State have given it a construction which is the only one consistent with its purposes and under which it is constitutional."

Some of the cases we have just cited speak more specifically of the Fourth Amendment only. Some of the earlier cases dealt specifically with the Fifth Amendment. In *Thorington vs. Montgomery*, 147 U. S. 490 the first syllabus definitely holds as follows:

"The Fifth Amendment to the Constitution operates exclusively in restriction of Federal power, and has no application to the States."

In *Maxwell vs. Dow*, 176 U. S. 581, it was held as follows:

"The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government."

Returning now to the specific questions presented for consideration of this Court by petitioner's brief (page 11) the first question presented is whether the seizure by city officials of policy or clearing house slips and the admission of the same in evidence in the trial in a municipal court violates the Fourth or Fifth Amendment.

The cases we have cited definitely indicate that the Fourth and Fifth Amendment are not restrictions against local officers and therefore there can be no question raised under the constitution of the United States with respect to these two amendments.

Question No. 2 presented is, has his privileges and immunities as a citizen of the United States been abridged and whether he has been deprived of liberty or property without due process of law or whether he has been denied the equal protection of the law. It must be concluded that the immunity that he is claiming under the Fourteenth Amendment is, that against unreasonable search and seizure guaranteed by the Fourth Amendment, and the right not to be compelled to be a witness against himself or deprived without property or due process of law as guaranteed by the Fifth Amendment. Since the Fourth and Fifth Amendments are restrictions of the power of the federal government only, his claim of violation of the Fourteenth Amendment must fail. Furthermore a violation of his rights under the Fourteenth Amendment to the Constitution of the United States was not presented to the State Court.

We have previously pointed out that a federal question was not definitely or specifically presented to the Court of Appeals which was the court of last resort on the merits of this case. We have pointed out that petitioner's claims of the federal question as raised by his appeal to the Supreme Court of the United States are based upon violation of the Fourth and Fifth Amendment to the Constitution of the United States and that these amendments are restrictions on federal power. It seems evident therefore that a federal question was not necessarily decided by the Court of Appeals, even if we assume that it was presented, it was not necessarily decided by the Supreme Court of Ohio when it overruled a motion to certify and denied an appeal as of right. We think it was obvious under the circumstances that a decision of the federal question was not necessary to a determination of the cause. In view of this, we feel that the case of *Honeyman vs. Hanan, Executor*, 300 U. S. 14 is controlling and the Court cannot take jurisdiction of the case at bar.

"1. To constitute jurisdiction over an appeal from a state court, it must appear, affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause."

CONCLUSION.

While we feel that the question of constitutionality of the ordinance is not presented to this Court, we might mention that the ordinance is quite similar to the New York law passed upon in the *Adams* case. (192 U. S. 585—last syllabus.)

Petitioner suggests, by reference only, the unconstitutionality of the ordinance under the Constitution of the State of Ohio. In this respect we might mention that it was held constitutional so far as the Constitution of Ohio is concerned, in the case of *City of Cleveland vs. Weisberg*, 141 O. S. 625. An identical ordinance was held constitutional in the case of *City of Xenia vs. Smith*, 139 O. S. 169.

While we do not believe that the record shows that the defendant in trial court was denied the right to offer evidence on a motion, nevertheless we maintain that the best that can be made of the record is that the trial court in making the ruling was fully cognizant of the fact that there was a search of the premises without a warrant and that the evidence sought to be suppressed was obtained in course of this alleged unreasonable and illegal search. That would be the only evidence so far as we can see that was capable of being offered. These facts appear to be clearly in the court's mind in view of the things the court said about the *Lindway* case. (*State vs. Lindway*, 131 O. S. 166.) The ruling was undoubtedly made by granting and assuming that everything they claimed about the search was true by holding that the evidence was admissible under the *Lindway* case. When we examine the various briefs filed by petitioner in other courts and when we examine

the petition for certiorari filed herein together with petitioner's statement of facts and brief thereon, we are convinced that the petitioner is making a vain attempt to obtain a review of the *Lindway* case rather than the case at bar.

The federal question was not definitely presented to the courts in Ohio. It was not necessary to decide any federal question for determination of the matters involved. And since this was not a federal procedure and not a search and seizure by federal officers but by city patrolmen and use of evidence in a municipal court, the 4th and 5th Amendments to the Constitution of the United States are not involved and if these are not involved then there is no grounds for claiming a violation of the 14th Amendment of the United States. We contend that in the case at bar our State court has not decided a federal question of substance not theretofore determined by this Court, but if it has, the decision is in accord with applicable decisions of the Supreme Court of the United States.

Therefore, we submit that the writ of certiorari herein should be denied.

Respectfully submitted,

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